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No. 94-157

In The

Supreme Court of the United States

October Term, 1994

ALBERT WITTER, and WIFE,
PHYLLIS WITTER,

Petitioners,

vs.

ULYSES NESBIT,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Tennessee, Western Section

BRIEF IN OPPOSITION FOR RESPONDENT NATIONWIDE MUTUAL INSURANCE COMPANY

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not Tenn. Code Ann. § 56-7-1206(a) violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, by providing uninsured motorist insurance companies the right to defend, as party defendants, against claims asserting reliance on the uninsured motorist coverages of their policies?

II. Whether or not Tenn. Code Ann. § 56-7-1206(a) violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, by providing uninsured motorist insurance companies the right to defend, as party defendants, against claims asserting reliance on the uninsured motorist coverages of their policies?

III. Whether or not the holding of the Court of Appeals of Tennessee, that it was erroneous under Tennessee law to allow a default judgment to be entered against an uninsured motorist that did not file any pleading when the uninsured motorist insurance company, acting pursuant to Tenn. Code Ann. § 56-7-1206(a), files an answer in its own name joining all issues of liability, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by depriving a party of a default judgment against an uninsured motorist?

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BRIEF IN OPPOSITION FOR RESPONDENT NATIONWIDE MUTUAL INSURANCE COMPANY

The Respondent, Nationwide Mutual Insurance Company[1], respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Court of Appeals of Tennessee, Western Section[2].

[1] Nationwide Mutual Insurance Company is a corporate entity with no parent company or subsidiaries.

[2] Petitioners erroneously seek a writ of certiorari to the Supreme Court of Tennessee. That court declined to exercise its jurisdiction over the case. Its order denying Petitioners' Application for Permission to Appeal is reprinted in Appendix C of the Petition for Certiorari. Thus, the petition for writ of

That opinion has not yet been published but is reprinted in Appendix B of the Petition for Certiorari.

STATUTES INVOLVED

28 U.S.C. § 1257 (1988), provides in pertinent part as follows:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Tenn. Code Ann. § 56-7-1206(a) (1989), states as follows:

(a) Any insured intending to rely on the coverage required by this part shall, if any action is instituted

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certiorari should be addressed to the Court of Appeals of Tennessee, Western Section. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 n.1 (1954); *American Ry. Ex. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Sullivan v. Texas*, 207 U.S. 416 (1908).

against the owner and operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party Defendant. Such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner and operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice; provided further, that the evidence of service upon the insurance carrier shall not be made a part of the record.

STATEMENT OF FACTS

This case arose out of an automobile accident which occurred in Memphis, Shelby County, Tennessee, on January 6, 1989. Albert Witter and his wife, the Petitioners, filed suit alleging negligence against the uninsured motorist, Ulyses Nesbit (hereinafter, "Nesbit"), also serving a summons and complaint on Nationwide Mutual Insurance Company (hereinafter "Nationwide"), pursuant to Tenn. Code Ann. § 56-7-1206, as the uninsured motorist insurance carrier for Albert Witter's employer. While Nesbit, filed no answer, Respondent, Nationwide, filed an answer in its own name contesting liability, as well as damages and other matters. Several months later, an order of default judgment was entered against Nesbit, which specifically stated that its effect was as to Nesbit only.

After extensive discovery and the handling of various procedural matters, a jury was impaneled and trial commenced on May 18, 1992. Following the proof, counsel presented closing arguments and the trial court charged the jury. The jury returned a verdict in favor of Nesbit and Respondent, Nationwide, on the issue of proximate causation. Moreover, pursuant to the Tennessee doctrine of modified comparative fault, the jury found that Petitioner, Albert Witter's own negligence was at least fifty percent of the total negligence resulting in his injuries and damages, thus barring the Petitioners' recovery.

The Petitioners moved for a new trial. Said motion was denied, and petitioners appealed this case to the Court of Appeals of Tennessee. Briefs were submitted, and the Court of Appeals of Tennessee, Western Section, heard oral argument. An opinion (Pet., Appendix B) and order were issued by the Court of Appeals affirming the judgment of the trial court and remanding the case for such further proceedings as may be necessary.

Following the opinion and order of the Court of Appeals. The Petitioners filed an application for permission to appeal to the Supreme Court of Tennessee. The application raised, for the first time, issues premised upon the Tennessee Constitution.[3] Permission to appeal to that court was denied. (Pet., Appendix C).

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[3] The Petitioners' application for permission to appeal to the Supreme Court of Tennessee raises "Constitutional" issues only under Article I, Section 8, and Article XI, Section 8 of the Constitution of Tennessee. (*See* Application for an Appeal by Permission to the Supreme Court [of Tennessee], p.9-10).

SUMMARY OF THE RESPONDENT'S ARGUMENT

I. This Court lacks jurisdiction to grant certiorari, as no federal questions were raised or passed upon in the state court proceedings.

II. There are adequate state grounds barring this court's consideration of the federal questions raised for the first time in the Petition for a Writ of Certiorari.

III. There is no merit to the Petitioners' assertion that they have been unconstitutionally denied a property interest in a default judgment.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Court lacks jurisdiction to grant certiorari, as no federal questions were raised or passed upon in the state court proceedings.

Early in the history of this Court it was established that the Court would not decide federal constitutional issues raised for the first time upon its review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Based upon § 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, it was held that the Court was not vested with jurisdiction over certiorari appeals from the state courts unless a federal question was raised and decided below. *Illinois v. Gates*, 462 U.S. 213, 217-18 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438; *Crowell v. Randall*, 35 U.S. 285, 10 Pet. 368 (1836). The above rule has developed, however, to the point that it is now more accurately stated that a federal claim will not be considered by the Court unless it has been *"either* raised or

squarely considered and resolved in the state court." *Gates*, 462 U.S. at 218 n.1 (citing *McGoldrick v. Campaigne Generale Transatlantic*, 309 U.S. 430, 434-35 (1940); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945)).

There is some question as to whether the above rule is jurisdictional or merely prudential. *Gates*, 462 U.S. at 219. It is the position of this Respondent that the rule is jurisdictional, but even if it were only a rule of self-restraint imposed by the Court there are sound reasons for its continued application. As a practical matter, the record below is not generally adequate to address the new questions presented. *Cardinale*, 394 U.S. at 439. Such is clearly true of the present case. Further, in our system of federalism it is crucial that state courts be given the opportunity to address the constitutional attack of a state statute prior to a hearing by this tribunal, for statutes may often be construed in a manner which preserves their constitutionality, or the issue may be obviated altogether on an adequate state ground. *Cardinale*, 394 U.S. at 219. Additionally, the relationship between this Court and state courts demands that the state courts be given the opportunity to propose changes in existing remedies even where unconstitutionality is found to exist. *Gates*, 462 U.S. at 221-22.

In the instant matter, no federal constitutional issue was raised at any stage of the state court proceedings. Nor is there any indication that federal constitutional issues were ever considered by the courts below. Thus, the petition in this case should properly be denied for want of jurisdiction as the record below does not affirmatively show that any federal constitutional issue was

raised or passed upon below. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

II. There are adequate state grounds barring this court's consideration of the federal questions raised for the first time in the Petition for a Writ of Certiorari.

It is the rule of this Court that "when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983).

For purposes of this case, the "highest state court," is the Court of Appeals of Tennessee, Western Section, since the Supreme Court of Tennessee did not exercise its discretionary jurisdiction over the matter. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 n.2 (1954); *American Ry. Ex. Co. v. Levee*, 263 U.S. 19, 20-21 (1923); *Sullivan v. Texas*, 207 U.S. 416 (1908).

It appears clear from the opinion of the Court of Appeals (Pet., Appendix B), that no federal questions were passed upon and, by Petitioners' own admission, no constitutional issues were presented to that court for review (Pet., p.9). Yet, even if this fatal flaw were overlooked, an adequate state ground exists for denying certiorari review as to the first two questions presented for review, as restated in this brief.

The Petitioners' arguments that Tenn. Code Ann. § 56-7-1206(a) violates the Equal Protection Clause of the Fourteenth Amendment, by placing injured drivers in the position of defending the same cause of action against duplicate defendants, and the Due Process Clause of the Fourteenth Amendment, by creating a conflict of interest between the uninsured motorist insurance company and the uninsured motorist, could have been raised in the trial court but were not. Failure to raise these constitutional issues in the trial court, creates an adequate state ground now barring this Court's review of those issues, for it is the general rule in Tennessee that constitutional attacks will not be entertained for the first time on appeal. *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). Thus, the Petitioners cannot overcome this Court's presumption that those issues were not properly presented below.

III. There is no merit to the Petitioners' assertion that they have been unconstitutionally denied a property interest in a default judgment.

As to Petitioners' third argument, that they were denied a default judgment in violation of due process by the state appellate court's holding that the default judgment was erroneously granted; it is without merit. The appellate court's holding is, as plainly set forth in its opinion (Pet., Appendix B), based upon well settled principles of statutory construction. Thus, its holding in this regard is based upon adequate state grounds.

The Petitioners' assertion that they have been stripped of a property interest by the Court of Appeals is absurd. This Court has long held that a default judgment against one defendant, where there are other defendants sued jointly for the same cause of action that have answered the Complaint, is not a final decree as to the defaulting defendant. *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 554 (1872). Under such circumstances, this Court has found that a judgment against the plaintiff on the merits, should properly lead to a dismissal of all defendants, including the defendant in default. *Id.* To treat the defendants differently under such a set of facts, would be "incongruous and illegal." *Id.* Thus, the Petitioners are erroneous in their assumption that the default judgment entered by the trial court was a final decree creating a property interest and this due process argument must necessarily fail.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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